No. PD-0477-19

IN THE
TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

ISSAC WILLIAMS, ***APPELLANT/RESPONDENT***

V.

STATE OF TEXAS, ***APPELLEE/PETITIONER***

ON THE STATE'S PETITION FOR DISCRETIONARY REVIEW FROM THE FOURTH COURT OF APPEALS CAUSE NO. 04-17-00815-CR

TRIED IN THE 187TH JUDICIAL DISTRICT COURT, BEXAR COUNTY, TEXAS
TRIAL CAUSE NO. 2014-CR-8370-B

APPELLANT/RESPONDENT'S MOTION FOR REHEARING

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JUDGES PRESIDING:

Honorable Joey Contreras – *Trial*
Honorable Raymond Angelini – *Motion to Suppress*
Honorable Steven Hilbig – *Pretrial Motions*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules:

ARGUMENT FOR REHEARING

After losing in the Fourth Court of Appeals, the state created a new theory of law that had no support from any Texas law. The majority chose to ignore existing law and join the state in this unsupported and fabricated legal analysis.[1]

The majority's opinion instructs trial lawyers that in addition to requesting a lesser included offense, the lawyer must now reference each factual issue that supports the instruction or the issue of whether the lesser-included instruction will be lost for appeal. Or, as discussed in the dissenting opinion, is this majority's holding limited to when a judge asks for evidence in the record? *Williams v. State*, PD-0477-19, 2021 WL 2132167, at *12 (Tex. Crim. App. May 26, 2021).[2] The majority opinion has created fertile grounds for confusion and opened the floodgates for future ineffective assistance of counsel claims.

The majority opinion also now requires a trial lawyer to take note of every detail, piece of evidence, statement, or inference that may support a lesser included offense while he or she is in the throes of trial just to reference each instance at the close of trial—if not, a particular fact may not be relied on during appeal. No other

[1] The state raised this issue of error preservation for the first time in its Petition for Discretionary Review. It was never addressed at the trial level, and the state did not complain about it with the Fourth Court of Appeals. Most likely because it was not an issue until the state lost and Appellant received a new trial. It is incredibly ironic that there is no burden on the state to raise a claim that error was not preserved in lower courts in order to preserve the complaint for appeal to this Court.
[2] As discussed *infra*, Appellant agrees with the dissent that the judge was not actually asking for specific record references in this case.

in-trial objection requires this level of detail in order for trial counsel to preserve error.

But, beyond the practical problems the majority opinion raises, it is also not supported by law. As Judge Yeary plainly stated in his dissenting opinion and joined by Judges McClure and Walker, "None of the cases that the Court cites robustly supports its holding." *Williams*, PD-0477-19, 2021 WL 2132167, at *9. The only thing to add to Judge Yeary's statement is that none of the cases *and none the law* cited by the court supports its holding.

Instead of relying on precedence from this Court, law that the legislature has passed, or common-sense reasoning, the majority chooses to place unreasonable burdens on defense lawyers that have never been required in Texas, the majority of other states, or nearly every federal jurisdiction.

There is no law cited by the majority to support its reasoning, yet there is *ample* law that addresses the issue of error preservation that is before the court. This available law, however, does not support the conclusion the Court reached. Thus, instead of relying on precedence and the law, the majority chose to simply ignore its obligation to follow precedence.

It is important to also note that the majority does not argue the record is devoid of any facts that would support the lesser included offense instructions. No, the majority instead just argues that what was plainly in the record was not pointed out

to the trial judge again during the charge conference. Timely legal objections are no longer enough—the majority now requires redundancy to preserve error for lesser-included offense instructions. The lawyer must not only timely state the legal objection but now must also regurgitate every fact that was already before the trial court who heard the trial in order to preserve error.

A. The Majority's Opinion Conflicts with Prior Opinions on Fairness and Party Responsibly for Error Preservation

The most important aspect of a criminal trial is fairness. *Borjan v. State*, 787 S.W.2d 53, 58–59 (Tex. Crim. App. 1990) ["The constitutional right of trial by jury, as guaranteed by the Sixth Amendment to the Federal Constitution and Art. I, § 15, Texas Constitution, unquestionably implicates the right to a fair trial, and not simply just the right to a trial by jury, because absent a fair trial there might just as well be no jury."] The rules, laws, and constitutional provisions that address trial aim to ensure that they are fair. And to be a fair trial, it must be reliable. When parties object and point out an unfair issue, then the chances of a fair trial increase because these issues can be addressed right away or on appeal. "First, a specific objection is required to inform the trial judge of the basis of the objection and afford him the opportunity to rule on it. Second, a specific objection is required to afford opposing counsel an opportunity to remove the objection or supply other testimony." *Saldano v. State*, 70 S.W.3d 873, 887 (Tex. Crim. App. 2002) (internal citations omitted).

A basic function of fair trials and error preservation is party responsibility. A party is responsible for bringing forth what it deems to be unfair so that an appellate court may review the alleged unfairness and correct it the error when appropriate. *Martinez v. State*, 91 S.W.3d 331, 335 (Tex. Crim. App. 2002).

With these principles of fairness and party responsibility in mind, this Court has long held that error preservation is not hyper-technical or formal. *Pena v. State*, 285 S.W.3d 459, 464 (Tex. Crim. App. 2009). Even general or imprecise objections are sufficient when the legal basis for the objection is obvious to the court or opposing counsel. *Buchanan v. State*, 207 S.W. 3d 772, 775 (Tex. Crim. App. 2006). A general or imprecise objection may be sufficient to preserve error for appeal when the legal basis for the objection is *obvious* to the court and to opposing counsel. *Buchanan*, 207 S.W.3d at 775 (emphasis added). Thus, even if this Court deemed counsel's request for a lesser-included instruction to be a general or imprecise objection, error was still preserved.

The objection to the jury charge in this case was obvious to the trial judge. In fact, once trial counsel requested the lesser-included offense instruction, Judge Contreras recited the correct legal standard for lesser-included offense instructions, thus showing his understanding of the request being made: "Is there—was there any evidence elicited—and refresh my memory—that if he's guilty of any offense, he's guilty of the lesser only and not the greater?" 7RR7-8.

The Court's opinion is not in line with the law in place on fairness and party responsibility. The majority's opinion stripped Appellant of his right to a fair trial by holding that his objection that was understood by all—even if general or imprecise—did not preserve error. *Pena*, 285 S.W.3d at 464; *Buchanan*, 207 S.W. 3d at 775.

B. The Issue Was Preserved According to Case Law on Error Preservation

The State in its briefing, and now the majority in its opinion, cited no caselaw to support the conclusion that "specific to requests for lesser-included offenses, the defendant must point to evidence in the record that raises the lesser-included offense." *Williams*, PD-0477-19, 2021 WL 2132167, at *6. In fact, right after that sentence there is a no citation, footnote, or any sort of reference to a law or rule that supports this holding. The state and majority clearly pulled this error preservation requirement out of thin air.[3]

As the dissent points out, the "briefing the Court has received also fails to point to any authorities that compel the Court's holding. Nether the parties nor the amicus brief filed in this case have cited to any Texas case holding that it is the

[3] *See Connolly v. State*, 983 S.W.2d 738, 741 (Tex. Crim. App. 1999) ("This 'defense' appears to have been created out of thin air") (Keller, J., dissenting); *Ex parte McJunkins*, 954 S.W.2d 39, 43 (Tex. Crim. App. 1997) ("in concocting an issue out of thin air which the State does not even raise . . . the majority's opinion is an inappropriate exhibition of judicial activism") (Overstreet, J., dissenting); *State v. Brabson*, 966 S.W.2d 493, 502 (Tex. Crim. App. 1998) (to avoid stare decisis, Judge McCormick avoids the true issue and creates an argument out of thin air.) (Baird, J., dissenting).

defendant's responsibility, when requesting a lesser-included offense instruction, to inform the trial court of the specific evidence showing him to be guilty of only the lesser-included offense." *Williams*, PD-0477-19, 2021 WL 2132167, at *9. Appellant did not cite to any Texas cases because none—until now—existed to support this fabricated theory of error preservation.

But it is not just that no case law existed to address this issue—the majority court also ignored precedence that rejected its holding. Until now, this Court has long held that in order to preserve an issue for appellate review, a party must make a timely and specific objection. *Layton v. State*, 280 S.W.3d 235, 238–39 (Tex. Crim. App. 2009).

This same rule is codified in the Texas Rules of Appellate Procedure 33.1(a)(1)(A), the Texas Code of Criminal Procedure 36.14, as well as Texas Rule of Evidence 103(a)(1). TEX. R. APP. P. 33.1(a)(1)(A); TEX. CODE CRIM. PROC. ANN. ART. 36.14; and TEX. R. EVID. 103(a)(1).

> [A]ll the party has to do to avoid the forfeiture of a complaint on appeal is to let the trial judge know what he wants, why he thinks he is entitled to it, and to do so clearly enough for the judge to understand him at a time when the trial court is in a proper position to do something about it.

Layton v. State, 280 S.W.3d 235, 238–39 (Tex. Crim. App. 2009) (*citing Lankston v. State,* 827 S.W.2d 907, 909 (Tex. Crim. App. 1992)).

Counsel's requests were timely and clear: he wanted lesser-included offense instructions, he provided specific lesser included offenses that he was requesting,

and he noted that he was entitled to the instructions because the lesser-included offenses were supported by the record. "If the correct ground of exclusion was apparent to the judge and opposing counsel, no waiver results from a 'general or imprecise objection.' *Id.* at 908." *Layton v. State*, 280 S.W.3d 235, 239 (Tex. Crim. App. 2009). Thus, the error was preserved for appellate review. *Id.* at 238–39. Citing to specific facts in the record was simply not a required exercise that case law required from trial counsel.

While the defense is required to first state what it wants and why it is entitled to it to preserve error, the real issue in error preservation is whether the court and the opposing party understood the request. *Id.* (holding that even general or imprecise objections are preserve error if the legal objection was apparent to the judge). Judge Contreras clearly understood what counsel was asking for because he stated the correct legal standard for lesser-included instructions on the record and then overruled the request. 7RR7-8. The majority places greater emphasis on what precise words counsel uses—which is not the standard—and less emphasis on what the court understood the objection was—which is the standard.

C. The Issue Was Preserved According to the Texas Code of Criminal Procedure and the Texas Rules of Appellate Procedure

Complying with the provisions of Article 36.14 only requires that a defendant or his counsel object in writing and specify each ground of objection. Objections dictated into the record satisfy the writing requirement. The objections may embody

omissions from the jury charge and the defense is not required to present special requested charges to preserve error. TEX. CODE CRIM. PROC. 36.14.

Texas Rule of Appellate Procedure 33.1 only requires that the objection or complaint be timely and state grounds for the ruling with sufficient specificity to make the trial court aware of the complaint, unless the specific grounds are apparent. Neither rule requires technical terminology and neither rule expressly hold that the factual basis for the objection must be addressed contemporaneously with the legal objection. Here, Judge Contreras clearly understood what trial counsel was asking for to be included in the jury charge, thus trial counsel satisfied the requirement that the trial court was aware of the complaint. TEX. R. APP. P. 33.1.

The Texas Code of Criminal Procedure article 36.14 uses a simple term to explain what is required to preserve an issue for appeal. "Compliance with the provisions of this Article *is all that is necessary* to preserve, for review, the exceptions and objections presented to the charge and any amendment or modification thereof." TEX. CODE CRIM. PROC. 36.14 (emphasis added). But the Court's majority now requires more from defense counsel than what the legislature instructed.

Trial counsel stated what he wanted and why he was entitled to it. When the trial judge asked if there was evidence that supported the lesser-included, counsel said he believed there was—and as the Fourth Court of Appeals found, there was

evidence in the record that warranted this instruction. Thus, the codified rules of error preservation were satisfied in this case.

D. The Issue Was Preserved According to the Majority's Own Reasoning

The majority court stated that a "trial judge errs when he refuses to submit an instruction on an actual lesser included when (1) such specific evidence is manifest, or (2) the defendant points to the specific evidence that negates the greater offense but supports the lesser offense." *Williams v. State*, at *6. Applying the majority's own reasoning, the lower court's decision should have been affirmed because the evidence was manifest i.e. clear in the record.

The Fourth Court of Appeals had no issue finding specific evidence in the record to support the lesser included offense instruction. In fact, the majority of this Court did not take issue with any of the facts that support the lesser included instruction. Most likely because the facts are very apparent, clearly obvious, or one could even say *manifest* in the record.

Because a trial judge failed to see what is clearly in the trial record for everyone to see, the majority infers that the evidence must not be clear because the obvious was not pointed out again to the trial judge. Yet, a competent panel of judges from the Fourth Court of Appeals was able to point to evidence from the record supporting the lesser included instruction. And these facts relied on by the lower court are not disputed by the majority.

E. The Majority's Reliance on the Trial Judge's Question to Trial Counsel is Misplaced

The majority seems to rely heavily on Judge Contreras asking trial counsel during the charge conference to cite to evidence in the record. But the trial judge did not ask for any specific facts from counsel he simply asked if there was any evidence elicited to support the lesser included. The three dissenting judges also found that this was not what Judge Contreras asked.

What is not contained in the record is the trial court telling trial counsel that he does not understand what the defense is asking for—because the judge knew what he wanted but his ruling showed he disagreed. How could the judge deny the request if he didn't understand the request? It may be silly to question whether the judge understood what counsel wanted under these facts but that is precisely what the majority thinks happened. The majority thinks Judge Contreras must not have understood what trial counsel wanted because it believes Judge Contreras needed facts from the trial pointed out to him to understand the objection. Because case law only requires that the objection be specific enough so that the trial court understands what is being requested. Judge Contreras clearly understood because he even recited the correct standard of law for this issue.

The majority faults trial counsel for not then pointing to specific facts. However, the judge simply asked if there was evidence and trial counsel said he believed there was evidence to support the lesser-included request. The majority also

claims that trial counsel sandbagged the judge because he interrupted him and did not let the judge ask another question. However, there is no indication what the next question was going to be. The judge simply said "do" and then trial counsel stated that he needed a ruling.

F. Should this Issue Be Considered for Egregious Harm?

Appellant clearly disagrees with the majority's decision, but, if this is unpreserved jury charge error as the majority wants it to be, should the error not be reviewed as unpreserved jury charge error under *Almanza v. State,* 686 S.W.2d 157 (Tex. Crim. App. 1985)? Clearly trial counsel wanted the jury instruction – that is not disputed. But the majority has created a new instance of when counsel attempts an objection but fails to do it completely, which places *Almanza* on shaky and uncertain ground. Not reviewing for at least egregious harm will create an unnecessary state of confusion in this area as the majority holding now apparently requires a defendant to forgo direct review and instead seek habeas relief. If the error is not reviewed at all a defendant will be forced to claim trial counsel was ineffective for not citing to specific facts in the record that support a lesser-included offense. This will open the floodgates for future litigation. Therefore the error should be reviewed for egregious harm.

G. Conclusion

The majority opinion avoids applying law to the facts of the case and creates new requirements for trial counsel that could open up claims of ineffective assistance of counsel for failing to state every tiny detail that supports the lesser-included instruction. This majority opinion should be reconsidered.

PRAYER

WHEREFORE PREMISES CONSIDERED, Appellant prays this Court reconsiders its opinion in this matter and affirms the Fourth Court of Appeals' decision to remand this case for a new trial.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically sent to Nathan Morey, nathan.morey@bexar.org, Assistant District Attorney and to the State Prosecuting Attorney, Stacey Soule, at Stacey.Soule@SPA.texas.gov on June 9, 2021.

/s/Dayna L. Jones
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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4, I certify that, according to Microsoft Word's word count, this document contains 3485 words.

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